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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 808

AMERICAN GUILD OF VARIETY ARTISTS,

Petitioner,

vs.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUMMARY STATEMENT OF FACTS

Respondent, William Smith, 58, started in the carnival business at 14 and continued to 1956. In 1957 be began producing shows for county fairs using circus acts. His shows increased in size until 1961. In 1961 he began booking larger and better fairs for 1962. His efforts culminated in contracts with 17 of the fair boards of the larger fairs in the five states of Minnesota, Wisconsin, Iowa, South Dakota and Michigan, beginning on July 28, 1962 at Faribault, Minnesota, and playing almost continuously (less travel time) and ending September 1, 1962 at Onekama, Michigan. For this run of shows Mr. Smith engaged A.G.V.A. Union performers on Union contracts. Prior to this run he had taken a circus for a tour of Canada and Alaska. Smith left the show at Edson, Canada, claiming one of the performers, Stebbing, had stolen the show (T. 329-332). When he left he owed the perform-

ers approximately $9,000.00 (T. 303). Most of the performers in the Canadian tour were also on separate contracts to perform on the summer tour commencing at Faribault.

On July 17, 1962 a meeting was held by the A.G.V.A. executive committee. No notice of the meeting was given Smith. At the meeting it was recommended Smith be placed on the unfair list (T. 1014; 1020). Herb Meyers, Minneapolis Branch Manager, sent Mr. Smith a telegram July 20, 1962 notifying him he was on the unfair list for nonpayment of salaries due its members (T. 49). Meyers did not have authority to place a producer (Smith) on the unfair list (T. 1021). This had to come from the national headquarters of A.G.V.A. A letter to this effect was not sent by national headquarters until July 30, 1962, after the Faribault fair (T. 1021).

In the meantime, on July 20, 1962, Mr. Meyers contacted the treasurer and secretary of the Faribault fair board by phone and ordered them to cancel Smith's contract, and when they protested they had a contract with Smith, were told it was void. To their protests that they had to have a show, he told them "they" would take over the contract and put on the same show (T. 445-447; 511-512).

At a meeting with the fair board arranged for the following Monday by Mr. Meyers, he (Meyers) told the fair board Smith was gone and his whereabouts unknown and that he could not and would not produce a show and said, "We're going to take over the contract" (T. 450), and negotiated for the contract, demanding a guaranty. Smith later appeared at this meeting.

At another meeting Monday night at which the fair board informed Meyers that it had been decided to honor Smith's contract, Mr. Meyers said, "You leave me no alternative but to picket your fair" (T. 456), and Meyers agreed this was his intent (T. 1041).

Meyers then sent telegrams to the other 16 fair boards informing them Smith was on the unfair list and contacted at least nine secretaries of the fair boards by phone (T. 748).

Many of the Union performers came to Faribault to work for Smith (T. 342; 412; 1099). Picketing was begun Thursday morning, July 26, 1962 and continued to 10:00 or 11:00 P.M. that night, picketing a thrill show of no connection with Smith (T. 459). They also picketed Friday during other shows having no connection with Smith. On Saturday they picketed Saturday morning and Saturday afternoon. Saturday afternoon the Smith show played and immediately afterward his contract was cancelled and he left the grounds.

After cancellation of Smith's contract the Union again tried to take over his contract. The fair board refused (T. 530; 552; 469). The Union had promised the pickets they would take over Smith's contracts, and if the performers wanted to work, they should stick with the Union (T. 1101).

The pickets continued Saturday night and Sunday. Many times during the week of the fair, Meyers and Stebbing approached fair board members about putting on the show in Smith's stead (T. 524; 526). The pickets carried misleading signs (T. 546).

On Saturday night several of the members of Smith's troupe were so frightened by threats from pickets that they remained in the grandstand until 2:00 A.M. Sunday morning (T. 759; 570; 574; 582; 765). During the fair other performers were threatened: helicopter pilot John Clark (T. 633; 655), trapeze girl Yvonne Stevens (T. 720; 743). The secretary of the Faribault fair board and mayor of Faribault, Frank Duncan, was also threatened. Mr. Duncan asked for police protection (T. 531). Other threats were made and the fair board took special precautions (T. 531; 588).

Smith's remaining performers quit when the Faribault contract was cancelled. Thereafter many of these acts played

fairs with whom Smith had contracts (T. 621; 591; 593).

Thereafter, with the exception of two weeks, respondent Smith was without employment up to the time of trial (T. 92).

This case was originally tried before Judge Devitt and a jury verdict for plaintiff, Smith, returned in the amount of $15,000.00. A new trial was granted on the grounds the verdict was excessive. The case was retried to a jury before Judge Larson. This jury returned a verdict for the plaintiff, Smith, for $21,500.00. Judge Larson granted judgment n.o.v. for the defendant union and on appeal the Circuit Court reversed and reinstated the verdict.

ARGUMENT

I.

Unlawful Interference with Contractual Relations Issue.

A. No Showing Is Made upon Which Relief Can be Granted.

The Circuit Court of Appeals in its decision:

1. Reversed the trial court's judgment N.O.V. for defendant and directed reinstatement of the verdict for plaintiff.

2. Held the trial court erred in withdrawing from the jury plaintiff's cause of action based on secondary boycott. Since the verdict on the first issue was favorable to this respondent, the Circuit Court held it was not prejudiced by the Court's failure to submit the secondary boycott issue.

Issue number 2 above is a moot question because this issue has never been considered by the jury. Almost all of petitioner's brief is directed toward this moot question.

For petitioner's petition to be successful it must first show that the Court erred in reinstating the verdict (number 1 above) and that its decision in this regard decided a federal question in conflict with applicable decisions of this Court.

Petitioner's brief at page 9, Argument I, practically ignores this issue and produces no arguments in support of its contention other than to argue the weight to be given certain evidence and refers in main to evidence considered by the Circuit Court in its holding on the secondary boycott issue (number 2 above). Petitioner cites four cases by this Court which he states are in conflict with the Circuit Court's decision in this matter, but wholly fails to point out wherein they are in conflict. We fail to see wherein they are applicable.

Respondent submits that the petitioner's petition is, therefore, completely inadequate, without merit on this point and should be denied.

B. The Object of the Union Activity Was Not Lawful.

Petitioner in his argument speaks rather defensively of the lawful object of the Union activity and the lawfulness of the strike, this being an essential basis of his argument.

Yet the record is so replete with instances of improper conduct and action of the Union it leaves no room for doubt that the Union had improper motives and objectives.

This is shown by the actions of the Union's branch manager, Herb Meyers.

Mr. Meyers put respondent on the unfair list. He then contacted two members of the fair board, Frank Duncan and Waldo Broberg, and in a series of phone calls and meetings:

1. Demanded of the fair board that they cancel Smith's contract and
2. Insisted that the Union would take over Smith's contract with the fair board and put on a show for the fair board in Smith's place and stead.

In effect, what the Union was doing was to compete with Smith as a producer and attempt to take over 17 county fairs Smith had spent over one year lining up for 1962. This is

amply shown by the following citations: T. 445-451, 488, 524-526, 514-521, 530, 552 and 469.

The evidence is so overwhelming on this point against the Union that there is little doubt of its illegal object.

Certainly the evidence was sufficient for the jury to consider the object of the Union activities. The jury, in two separate trials, considered all the facts and returned substantial verdicts in favor of the plaintiff which shows with little doubt that the Union's objective was to put Smith out of business and appropriate his contracts.

II.

The Secondary Boycott Issue.

The crux of petitioner's argument in regard to the secondary boycott issue appears to be that the Union conducted a peaceful primary strike in a lawful manner.

In contrast, the Circuit Court of Appeals of the Eighth Circuit found that there was evidence upon which a jury could find that said strike was not primary, not peaceful and in violation of 29 *U.S.C.A.* 158(b)(4) in that its object was to compel the fair board to cease doing business with respondent. This finding is amply supported by two jury verdicts for substantial amounts prior to the Circuit Court holding.

Petitioner claims the decision of the Court of Appeals for the Eighth Circuit in this matter is in direct conflict with the decisions of this Court regarding the application of 29 *U.S.C.A.* 187 and 29 *U.S.C.A.* 158(b)(4). It cites as authority for this position *United Steel Workers of America v. N.L.R.B.*, 376 U.S. 492, 84 S.Ct. 899 (1964), and *Local 761, International of E. R. & M. Workers v. N.L.R.B.*, 366 U.S. 667, 81 S.Ct. 1285 (1961).

There is no conflict between the holding of the Eighth Circuit Court in this matter and the *United Steel Workers* case.

The holding of the Eighth Circuit Court is that the trial court was not justified in finding as a matter of law that the picketing was lawful primary picketing. The Eighth Circuit Court found (as the facts disclose) that a common situs problem was presented as the picketing took place on the fair's premises and therefore applied the evidentiary standards for distinguishing between primary and secondary picketing at a common situs. These are commonly referred to as the "Moore Dry Dock Tests," *Sailors Union of the Pacific and Moore Dry Dock Company*, 92 N.L.R.B. 547. Application of these tests indicated the Union's activities did not meet them. The Court then looked to the objective of the Union to see if there was a violation of No. 158(b)(4) and found that there was an evidentiary basis for a jury to so find that a common situs situation was presented, that the strike was not a lawful primary strike and that an objective of the strike was to compel the fair board to cease doing business with the plaintiff.

The *United Steel Workers* case involved a strike at the primary employer's plant and the activity at one of the gates at that plant. This Court held the secondary employees, with whom the picketing employees interfered, were engaged in activities in furtherance of the primary employer's normal business, and picketing directed at such secondary employees did not change a lawful primary strike into an illegal secondary boycott prohibited by 158(b)(4) but that it was protected by the provisions of subsection (b). There is ample evidence in the record that during a great deal of the picketing which occurred in this case Smith had no normal business but the fair board did, and it was this business that was picketed, and that there was ample evidence that the reason this was done was to compel the fair board to cease doing business with Smith, the objective of the Union being to appropriate Smith's contracts.

The facts are replete with incidents which conclusively show that the picketing was aimed at the fair board and not at Smith. Numerous attractions were scheduled for the grandstand during the fair. A Thrill Show was scheduled for Thursday night and wrestling on Friday. On Sunday there was an Auto Show. None of these shows were connected in any manner with Smith. In addition, numerous exhibitors had their exhibits under the grandstand. These also had no connection with Smith. Yet even so, the record shows unequivocably that the Union persisted in picketing these shows and exhibitors right through Sunday, even though Smith had left the grounds on Saturday afternoon. The pickets carried signs that could be construed to indicate they were picketing the fair and the circus. Furthermore, the Union placed the fair board on the unfair list (T. 491, 542).

All of the above would indicate the object of the Union was to interfere with normal operations of the fair board with the purpose of compelling the fair board to cease doing business with Smith and to appropriate his contracts and, therefore, hardly within the holding in the *United Steel Workers* case. Nor is the *Local 761, International of E. R. & M. Workers v. N.L.R.B.*, above cited, of any comfort to petitioner. In that case this Court said, "The application of the Dry Dock tests, to limit the picketing effects to employees of the employer against whom the dispute is directed, carries out the 'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' N.L.R.B. v. Denver Building and Constr. Trades Council, 341 U.S. at page 692, 71 S.Ct. at page 953."

CONCLUSION

Petitioner has wholly failed to show conflict with the decisions of this Court.

Petitioner produces a vacuum of evidence and law to substantiate his contentions on the issue of interference with contractual relations, yet his case cannot stand on the secondary boycott issue as this was not presented to the jury.

On the secondary boycott issue there was ample evidence for a jury to consider in their determination whether, from the facts, the Union activity was directed against Smith or against the fair board. However, this issue was never presented to the jury. The appeals court merely ruled that the trial court was in error in not submitting this issue to the jury.

Respondent suggests that the real "warp and woof" to which petitioner alludes is the rather dismal prospect that the time has arrived when payment of the judgment can no longer be delayed but must be made. A task very distasteful to petitioner and undoubtedly one the mere thought of which has prompted many a petition for writ of certiorari to be hastily drawn and submitted. There are many grounds upon which a writ may issue; however, prolongation of agony does not happen to be one of them.

We therefore submit that the petition should be denied.

Respectfully submitted,

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